

4. The Court has found that the FBI, CIA, and DOS are “closely aligned” with the Government in this case. Appellate Exhibit XXXVI, p. 11. The Court has not been requested to make a similar determination regarding DHS records. However, the Defense would submit that DHS is also closely aligned with the Government in this case.

ARGUMENT

5. The Government's non-*ex parte* filings and redacted *in camera* motions provided to the Defense request the Court to authorize redactions and substitutions under either RCM 701(g)(2) or MRE 505(g)(2). Specifically, the Government requests the following:

- a) DHS Document. The Government requests the Court to "authorize a redaction of material within one DHS document under RCM 701(g)(2) that is neither favorable to the accused and material to guilt or punishment, nor relevant and necessary for production under RCM 703(f)." *See* Government *ex parte* Motion for Authorization of a Redaction of Material within One Department of Homeland Security Document under RCM 701(g)(2), dated 14 September 2012.
- b) CIA Report. The Government requests the Court to "authorize a summary of information contained within CIA documents that is favorable to the accused and material to guilt or punishment, or relevant and necessary for production under RCM 703(f)." *See* Government *in camera* Motion for Authorization of a Summary of CIA Information under MRE 505(g)(2), dated 14 September 2012.
- c) FBI File. The Government requests approval of redactions from the FBI file. The Government has apparently identified two folders of information with proposed redactions. The first folder, "Folder 3," apparently contains 184 documents and the second folder, "Folder 4," contains 90 documents. In each folder, the Government requests the Court to authorize the identified proposed redactions. The Government presumably basis its request on a belief that the redactions are neither favorable to the accused and material to guilt or punishment, nor relevant and necessary for production under RCM 703(f). *See* Supplement to Government *in camera* Motion for Authorization of Redactions for the FBI file under MRE 505(g)(2), dated 14 September 2012.
- d) DOS Records. The Government requests the Court to "authorize a redaction of portions of Department documents under RCM 701(g)(2) that are neither favorable to the accused and material to guilt or punishment, relevant and necessary for production under RCM 703(f), subject to production under the Court's Order dated 19 July 2012, nor 'necessary to enable the accused to prepare for trial' under MRE 505(g)(2)." *See* Government *in camera* and *ex parte* Motion for Authorization of a Redactions of Department of State Records under MRE 505(g)(2) and RCM 701(g)(2), dated 14 September 2012.

6. As part of its request, the Government provided the following additional detail:

- a) DHS Document. The Government has indicated that "it will not use the redacted information during any portion of the trial." *See* Government *ex parte* Motion for Authorization of a Redaction of Material within One Department of Homeland Security Document under RCM 701(g)(2), p. 2.
- b) CIA Report. The Government has indicated that it "will not use any portion of these CIA documents not disclosed to the defense during any portion of the trial." *See* Government *in camera* Motion for Authorization of a Summary of CIA Information under MRE 505(g)(2), p. 3.
- c) FBI File. The Government has indicated that it "will not use any portion of the redacted information *not disclosed to the defense* during any portion of the trial." *See* Supplement

to Government *in camera* Motion for Authorization of Redactions for the FBI file under MRE 505(g)(2), p. 2. The caveat “*not disclosed to the defense*” ordinarily would not be troubling to the Defense. However, the Government placed emphasis on the fact that it did not identify whether the proposed redactions may have already been provided to the Defense is some other form of discovery unrelated to the FBI file. *Id.* at p. 1 (“The United States did not identify whether proposed redactions were made available to the defense in discovery from another source, but instead has altered the redactions in the FBI file so that information provided to the defense in discovery from other sources is also available to the defense in the FBI file.”) (emphasis in original). The Government’s statement, besides being confusing, appears to provide it with the ability to use redacted information during other portions of the trial if it can point to how the redacted information was provided to the Defense in discovery apart from the FBI file. If this is indeed the Government’s position, the Defense requests the Court to not allow the Government to redact this information. If the information has been provided to the Defense in other forms of discovery, then the Government’s basis for redacting it in the FBI file is no longer a consideration. Additionally, by allowing the proposed redactions, the Government would benefit from the confusion that would undoubtedly follow given the inability of the Court and the Defense to identify which information has been previously provided in the voluminous discovery and which information has not. Whether the Government is able to use any redacted information from the FBI file should not be placed into such doubt. As such, the Court should require the Government to identify any such information and subsequently deny the Government’s request for authorization of the identified redactions.

- d) DOS Records. The Government has indicated that it “will not use any portion of the redacted information not disclosed to the defense during any portion of the trial. This includes rebuttal and rule of completeness if the defense introduces or references anything in the substitution.” *See* Government *in camera* and *ex parte* Motion for Authorization of a Redactions of Department of State Records under MRE 505(g)(2) and RCM 701(g)(2), p. 5.

7. The Government requests this Court to approve of its determination that the Defense is not entitled to discovery of the redacted or substituted information. In considering whether the proposed substitutions or redactions are sufficient, the Court must determine if the disclosure of the classified information itself is necessary to enable the accused to prepare for trial. MRE 505(g)(2). In making this determination, the Defense requests that this Court consider the analysis proposed by the Defense in Appellate Exhibit CLXXXII and the following factors adopted by the Court in Appellate Exhibit CXLVI:

- a) What is the extent of the redactions/substitutions?
- b) Has the Government narrowly tailored the substitutions to protect a Governmental interest that has been clearly and specifically articulated?
- c) Does the substitution provide the Defense with the ability to follow-up on leads that the original document would have provided?
- d) Do the substitutions accurately capture the information within the original document?
- e) Is the classified evidence necessary to rebut an element of the 22 charged offenses, bearing in mind the Government’s very broad reading of many of these offenses?

- f) Does the summary strip away the Defense's ability to accurately portray the nature of the charged leaks?
- g) Do the substitutions prevent the Defense from fully examining witnesses?
- h) Do the substitutions prevent the Defense from exploring all viable avenues for impeachment?
- i) Does the Government intend to use any of the information from the damage assessments? Is so, is this information limited to the summarized document provided by the Government? If the information intended to be used by the Government is not limited to the summarized document, does the Defense in fairness need to receive the classified portions of the documents to put the Government's evidence in proper context?
- j) Does the original classified evidence present a more compelling sentencing case than the proposed substitutions by the Government?
- k) Do the proposed substitutions prevent the Defense from learning names of potential witnesses?
- l) Do the substitutions make sense, such that the Defense will be able to understand the context?
- m) Is the original classified evidence necessary to help the Defense in formulating defense strategy and making important litigation decisions in the case?
- n) Is it unfair that the Government had access to the unclassified version of the damage assessment and the Defense did not? Does that provide a tactical advantage to the Government?

CONCLUSION

8. The Defense requests that this Court deny any proposed redactions or substitutions from the DHS document, CIA Report, FBI file, and DOS records where, considering the mindset of Defense counsel (including the questions referenced herein), the Court concludes that the classified information itself is necessary to enable the accused to prepare for trial.

Respectfully submitted,

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